Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council

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Introduction

On 6 September 2017, the Court of Justice of the European Union (CJEU) handed down the judgment in an action brought by two EU Member States, Slovakia and Hungary, supported by Poland, against Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece ('the Decision'). The Decision provided for the establishment of a relocation mechanism which planned to distribute 120 000 refugees from Italy and Greece to other EU Member States. This short contribution discusses two important points addressed in the judgment: the legal basis of the contested Decision (Article 78(3) TFEU) and the principle of solidarity and fair sharing of responsibility.

Article 78(3) TFEU, a legal basis for effective action

The CJEU's interpretation of Article 78(3) TFEU regarding the EU's competence to adopt provisional measures in response to sudden influxes of third country nationals is an important contribution to the overall puzzle of EU asylum policy. Even if the provision were never invoked again, the enabling character of the judgment – the recognition of *effet utile* in this domain – will loom large over future decision-making in asylum matters. The clarification of the procedural aspects of EU law-making is a welcome bonus.

While clearly an important addition to asylum law, the spectacle accompanying the judgment, underscored by the Grand Chamber composition of the Court and running to an uncharacteristic length for similar actions of 347 paragraphs, belies the degree of agreement among the CJEU, the Opinion of Advocate General Bot and the defendant (represented by the Council Legal Service). As far as politicized cases go, this was a relatively clear-cut one.

The Court opened the examination of the legal basis and competence to adopt the disputed Decision with a reference to Article 289 TFEU concerning legislative procedures. Applying a contrario reasoning to the provisions of the Treaty, the CJEU deduced that the absence of a mention of either the ordinary or the special legislative procedure in Article 78(3) TFEU meant that measures adopted on the basis of this provision are non-legislative acts, as legislative acts are only those adopted following one of the legislative procedures – all other acts are non-legislative. It is rare for the Council to lay down binding rules in a non-legislative act in an area covered by the TFEU; such acts are more commonly associated with the provenance of the CFSP or implementing measures adopted by the Commission. The interpretation of this point confirmed the Court's preference for a formal approach to assessing the nature of EU acts

which is consistent with Article 289 TFEU, leaving to the side the fact that the procedure in Article 78(3) TFEU provides for the involvement (consultation) of the European Parliament in a way similar to the special legislative procedure.

Having settled the nature of the disputed act, the CJEU turned to the arguments of the applicants regarding the permissible effects of a non-legislative act adopted pursuant to Article 78(3) TFEU, such as the refugee relocation Decision at issue in the proceedings. The question the CJEU answers in this respect is, in essence, whether, and if so, to what extent, non-legislative 'provisional measures' can derogate from legislative acts, such as the Dublin Regulation. This is a legitimate question from a democracy and rule of law perspective, because the modification of legislative acts by non-legislative acts amounts to a de facto circumvention of established procedures which in a legal order based on the rule of law (*Les Verts*) have an important legitimating function. Arguably, such adverse effects of the circumvention on democratic legitimacy are marginally mitigated in the case of Article 78(3) TFEU by the requirement to consult the Parliament.

Before actually reviewing whether Council Decision (EU) 2015/1601 represents an acceptable encroachment on established law-making standards, the CJEU threw its weight specifically behind the EU's competence to adopt 'provisional measures' on the basis of Article 78(3) TFEU and EU asylum competences more generally. The Court rejected the argument that the scope of the provisional measures should be limited to such actions which could be adopted in the 'normal' course of law-making, i.e. on the basis of Article 78(2) TFEU. The Court held that:

"(…) those provisions are complementary, permitting the European Union to adopt, in the context of the common policy on asylum, a wide range of measures in order to ensure that it has the necessary tools to respond effectively, both in the short term and in the long term, to migration crises" [74]

The Court furthermore emphasized the wide mandate of Article 78(3) TFEU – it's all about effectiveness of EU action:

"(…) the concept of 'provisional measures' within the meaning of Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries" [77]

In the final step of the judicial review of the legal basis and competence, the CJEU predictably found that (1) the non-legislative provisional measures may in principle derogate from legislative acts; (2) provided that the material and temporal scope are limited; and that (3) these conditions were satisfied in the case at hand, as the relocation scheme did not have the 'object or effect of replacing or amending legislative acts permanently and generally' [78-79].

Although the CJEU goes on to painstakingly refute every argument, however improbable, put forward by Slovakia and Hungary, the core of its conception of Article 78(3) TFEU provisional measures is captured in its emphasis on effectiveness. For that purpose the Court also excluded from the review of the relocation scheme the effects on the persons relocated which, by its own admission are 'more or less long-term' [99]. Overall, the Court's interpretation of Article 78(3) TFEU solidified the impression that in the EU system there exists now a 'backstop' of sorts in case of sudden and massive migratory pressures. In this sense, the recognition of Union crisis capacity is reminiscent of the judgment in *Gauweiler* which permitted the ECB to purchase bonds on secondary markets (and thereby significantly contribute to the rescue of the euro). A similar interpretive intention in the Area of Freedom, Security and Justice is arguably less controversial: after all, as noted by the Court [91], the effectiveness of Article 78(3) TFEU was consciously strengthened in the latest round of Treaty revisions during which the Member States, including Slovakia and Hungary, agreed to remove a temporal cap of six months on provisional measures of the kind adopted in 2015 (see Article 64(2) TEC).

Taking solidarity seriously

The second legal provision, or more precisely, principle, set to benefit from the CJEU's interpretation is Article 80 TFEU and the principle of solidarity contained therein. Article 80 TFEU requires that migration and asylum matters be 'governed' by the principle of solidarity and fair sharing of responsibility. 'Whenever necessary', the provision continues, 'the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.' And so the relocation Decision did just that, referring to 'solidarity' eight times in the recitals.

The CJEU duly recognized in the judgment the rather important role assigned to solidarity in Article 80 TFEU. In addition to supporting the adoption of the contested Decision in general, the principle of solidarity and fair sharing of responsibility mandated, according to the Court, that Hungary be allocated quotas of refugees in the same manner as all other Member States despite the country's ostentatiously communicated refusal to participate in any way [293]. As also pointed out by the Court, the principle of solidarity did not formalistically entrap the Member States in the relocation mechanism at all costs. Rather, it was consistent with the principle to allow derogations from the quotas if participating Member States were themselves faced with an emergency situation, as exemplified by the exemptions granted to Austria and Sweden [294-296].

In the wake of *Slovakia and Hungary* it appears fair to say that the principle of solidarity between Member States is legally the most operational it has ever been. However, it would be premature to generalize the Court's interpretation beyond immigration and asylum matters or possibly even beyond the contested Decision. Not only is the relocation scheme one of the most concrete solidarity measures taken at EU level, Article 80 TFEU contains the strongest and most operational 'solidarity' language among the 25 mentions of the term in the EU Treaties. Unlike other provisions, such as on energy (Article 194(1) TFEU), which speak of the 'spirit of solidarity', Article 80 TFEU treats solidarity as a principle in its own right which moreover 'governs' immigration and asylum policies. The contrast between the principle of solidarity and the 'spirit of solidarity' is particularly poignant when one recalls the fortunes of the unused Temporary Protection Directive, Article 25 of which uses the latter formulation. Nevertheless, and despite the important stride taken in *Slovakia and Hungary* towards an obligatory notion of solidarity, it is improbable that the principle will sway the CJEU's judgments (or 'govern' EU policy) on asylum and immigration as a matter of course. Migration is politically a highly combustible area of EU action and the Court is likely to lean towards more pragmatic than principled positions, as it notably did earlier in 2017 in the case of *X and X v Belgium*.

Conclusion

One of the more anticipated judgments of the year 2017 came with few surprises. The case was decisively won by the Council of the EU which had the support of numerous Member States and the European Commission. By bringing the action, Slovakia and Hungary somewhat ironically gave the CJEU the necessary platform to make a rather lengthy statement endorsing the majoritarian position among the Member States as regards the validity and necessity of the relocation mechanism. In the process, the EU competence to enact provisional measures under Article 78(3) TFEU and the principle of solidarity in EU migration policy have been strengthened. The precedent thus created is bound to be invoked in future disputes and policy.

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(This journal entry is an expression of the authors' own views, and not those of EDAL or ECRE).